

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

JH

ROBERT M. FISHMAN, )  
                          )  
                          Plaintiff, )  
                          )  
                          v. )                          No. 05 C 5227  
                          )  
ZURICH AMERICAN INSURANCE COMPANY, )  
et al., )  
                          )  
                          Defendants. )

MEMORANDUM ORDER

During the November 9, 2006 follow-up hearing on the motion by Robert Fishman ("Fishman") to compel discovery of a host of documents, as to which defendants (collectively "Zurich," treated for convenience as a singular noun) have asserted insulation from such discovery under the attorney-client privilege or the work product doctrine or both, it became even more clear that the impasse between the parties could not be resolved based on their previously filed submissions. This Court then agreed (though with some reluctance) to consider the contested documents *ex parte* in an effort to break the logjam. As might perhaps have been expected, there is some reason to regret having taken that route, for the package that Zurich's counsel have since delivered to this Court's doorstep comprises three privilege logs (photocopies of which are attached) and no fewer than 78 documents (which have been numbered for convenience in the attached photocopies).

In any event, this Court has indeed reviewed the documents

one by one, and this memorandum order will summarize the results of that review. There have been some close calls at the margin, but in those instances Fishman's motion is being denied in light of the high value that the law places on the privilege and doctrine at issue.

First, among the documents identified in the privilege log regarding Fishman's first request for documents, discovery is denied as to Docs. 2 through 11, 13 through 30, 32 through 43 and 45 through 54. Only one document--Doc. 55--is the subject of the privilege log as to Fishman's second request for documents, and its production will also not be required. Lastly, as to the supplemental privilege log in connection with both the first and second requests for documents, Fishman's motion to compel is denied as to Docs. 57 through 67.

On the other side of the coin, this Court has rethought the issue that has been the focal point of the parties' argument to this point. It has concluded that the critical fact is that both the July 8, 2005 minutes of the Administrative Committee (Bates Nos. Z468-69) and the ensuing July 12, 2005 letter from Administrative Committee Chairperson Diane Whidden to Fishman's attorney Mark Furlane state that the Committee's determination adverse to Fishman was reached "with the advice of counsel." To be sure, Zurich's counsel have stated orally that such was not the case, but that disclaimer cannot be credited under the

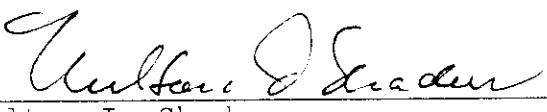
circumstances revealed in the documents submitted to this Court. And that acknowledgment has made a number of the communications that might otherwise be insulated from disclosure fair game.

Accordingly Zurich is ordered promptly to produce to Fishman's counsel Docs. 1 (Doc. 56 is the same document directed to a different addressee), 31, 68, 75 (which incorporates Docs. 73 and 74), 76, 77 and 78. As will be seen from such production, a number of those documents confirm that the Administrative Committee's determination was in fact vetted by a number of lawyers, so that the "advice of counsel" acknowledgment is indeed supported by such evidence.

Apart from that required production, all of which relates to the disputed issue as to whether the plan in which Fishman was a participant is or is not a top hat plan, it appears that the parties are also at odds as to whether Zurich has applied the plan's competition-forfeiture provision uniformly. That issue is implicated by Doc. 44 and related Docs. 69 through 72. Because Fishman and his counsel have not had access to those documents, this Court requests further input from Zurich's counsel on or before November 25, 2006--again via an in camera response--as to whether the advice-of-counsel issue may also forfeit Zurich's invocation of the attorney-client privilege and work product doctrine as to those documents. Under the circumstances, that response is ordered to be tendered in camera to avoid any

improvident premature disclosure.

Finally, it is unclear whether the parties are at odds as to whether Fishman's benefits may properly be forfeited under the circumstances of this case even if the plan does qualify as a top hat plan. That question is implicated in Doc. 12, and here too the procedure described in the preceding paragraph is to be followed by Zurich's counsel.

  
Milton I. Shadur  
Milton I. Shadur  
Senior United States District Judge

Date: November 15, 2006

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ROBERT M. FISHMAN,

Plaintiff,

Case No. 05C-5227

- against -

Judge: Milton I. Shadur

ZURICH AMERICAN INSURANCE  
COMPANY AND ZURICH NORTH  
AMERICA SUPPLEMENTAL EXECUTIVE  
RETIREMENT PLAN,

Defendants.

**DEFENDANTS' PRIVILEGE LOG IN CONNECTION WITH ROBERT M. FISHMAN'S FIRST  
REQUEST FOR DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendants Zurich American Insurance Company and Zurich North America Supplemental Executive Retirement Plan (together, "Zurich") submit the following privilege log in connection with Plaintiff's First Request for Documents:

**Withheld Documents**

Author	Recipient(s)	CC:	Date of Document	Type of Document	Re:	Basis of Withholding
Willkie Farr & Gallagher LLP	Administrative Committee of the SERP		January 4, 2005	Memorandum with attachments	Zurich North America SERP, Robert Fishman	Attorney Client Privilege Work Product
David Bowers	Peter Haller, Esq. (WF&G)		June 3, 2004	Email	Fishman-Privileged and Confidential	Attorney Client Privilege
David Bowers, Esq.	John Amore, Diane Whidden	Peter Haller, Esq., Rhiannon Schmieg, Esq.	June 7, 2004	Email	Draft Retirement Message	Attorney Client Privilege
Peter	Dave Bowers,		June 11,	Email	Retirement -	Attorney Client

4	Haller, Esq.	Esq., John Amore, Dianne Whidden, Kathy LeBoyer, Rhiannon Schmieg, Esq.		2004		Privileged and Confidential	Privilege
5	Dave Bowers, Esq.	Peter Haller, Esq., John Amore, Dianne Whidden, Kathy LeBoyer, Rhiannon Schmieg, Esq.		June 11, 2004	Email	Retirement - Privileged and Confidential	Attorney Client Privilege
6	Diane Whidden	Dave Bowers, Esq.	Peter, Haller, Esq., John Amore, Dianne Whidden, Kathy LeBoyer, Rhiannon Schmieg, Esq.	June 11, 2004	Email	Retirement - Privileged and Confidential	Attorney Client Privilege
7	Kathy LeBoyer	Dave Bowers, Esq.	John Amore, Diane Whidden, Rhiannon Schmieg, Esq., Peter Haller, Esq.	June 14, 2004	Email	Retirement - Privileged and Confidential	Attorney Client Privilege
8	Peter Haller, Esq.	Diane Whidden	Dave Bowers, Esq., Rhiannon Schmieg, Esq.	July 22, 2004	Email	Fishman Joins Quanta US Announcement - Bloomberg call	Attorney Client Privilege
9	Diane Whidden	Peter Haller, Esq.	Dave Bowers, Esq., Rhiannon Schmieg, Esq.	July 22, 2004	Email	Fishman Joins Quanta US Announcement - Bloomberg call	Attorney Client Privilege
	Peter	Diane	Stephen	July 23,	Email with	Fishman SERP	Attorney Client

10	Haller, Esq.	Whidden, Dave Bowers	Lindo, Esq. (WF&G)	2004	attachment	Forfeiture Letter	Privilege Work Product
11	Dave Bowers, Esq.	John Amore	Diane Whidden, Monica Maechelr, Peter Haller, Esq.	August 16, 2004	Email	Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
12	Willkie Farr & Gallagher LLP	David Bowers, Esq.	Stephen Lindo, Esq., Brian O'Connor, Esq. (WF&G), David Rubinsky, Esq. (WF&G)	August 31, 2004	Memorandum	Fishman Proposal	Attorney Client Privilege Work Product
13	David Bowers, Esq.	John Amore, Dick Kearns, Monica Maechler, Diane Whidden, Stephen Lindo, Esq., Peter Haller, Esq.		September 13, 2004	Email	Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
14	Peter Haller, Esq.	Files		October 15, 2004	Memorandum	Fishman SERP Chronology	Work Product
15	Erin Miller, Esq. (WF&G)	Peter Haller, Esq.		May 9, 2004	Memorandum	Enforceability of Forfeiture Provision	Work Product
16	Dave Bowers, Esq.	Peter Haller, Esq.		May 21, 2004	Email	Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
17	Dave Bowers, Esq.	John Amore	Diane Whidden	May 26, 2004	Email	Draft Message to Jim Schiro; Privileged and Confidential	Attorney Client Privilege Work Product
18	Dave Bowers, Esq.	James Schiro	John Amore, Diane Whidden	May 26, 2004	Email	Rob Fishman, Privileged and Confidential	Attorney Client Privilege

19	James Schiro	Dave Bowers, Esq.	John Amore, Diane Whidden, Dick Kearns, Monica Maechler-Erne	May 26, 2004	Email	Rob Fishman, Privileged and Confidential	Attorney Client Privilege
20	Dave Bowers, Esq.	John Amore	Diane Whidden, Peter Haller, Esq., Stephen Lindo, Esq.	August 30, 2004	Email	Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
21	Dave Bowers, Esq.	John Amore	Diane Whidden, Monica Maechler, Peter Haller, Esq.	August 16, 2004	Email	Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
22	Dave Bowers, Esq.	John Amore	Diane Whidden	August 12, 2004	Email	Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
23	Dave Bowers, Esq.	John Amore, Diane Whidden		August 9, 2004	Email	Rob Fishman, Privileged and Confidential	Attorney Client Privilege Work Product
24	Andre Burke	Dave Bowers, Esq.	Craig Fundum	July 23, 2004	Email with attachment	Competitive Overview of Quanta U.S. Holding, Inc.	Attorney Client Privilege
25	Dave Bowers, Esq.	Diane Whidden		July 23, 2004	Email with attachment	Fishman SERP Forfeiture Letter	Attorney Client Privilege Work Product
26	Dave Bowers, Esq.	John Amore	Diane Whidden, Rhiannon Schmieg, Esq.	May 4, 2004	Email with attachment	Resignation, Privileged and Confidential	Attorney Client Privilege Work Product
27	Dave Bowers, Esq.	John Amore	Diane Whidden	May 15, 2004	Email with attachment	Rob letter, Privileged and Confidential	Attorney Client Privilege Work Product
28	Dave Bowers, Esq.	John Amore	Diane Whidden	May 23, 2004	Email	Retirement discussions, privileged and	Attorney Client Privilege

					confidential	
26	Dave Bowers, Esq.	James Schiro	John Amore, Diane Whidden, Dick Kearns, Monica Maechler-Erne	May 26, 2004	Email	Re: Rob Fishman, privileged and confidential
27	Diane Whidden	Dave Bowers, Esq.		May 27, 2004	Email	Draft email
28	Willkie Farr & Gallagher LLP	David Bowers, Esq., Rhianon Schmieg, Esq.		July 5, 2005	Memorandum	Robert Fishman's Claim for Benefits under the ZNA SERP
29	Dave Bowers, Esq.	Diane Whidden	John Amore	June 13, 2004	Email	Rob Fishman Announcement Edits
30	Dave Bowers, Esq.	Diane Whidden	John Amore	June 14, 2004	Email	Rob Fishman Announcement Edits
31	John Amore	Dave Bowers, Esq.		July 30, 2004	Email	SERP
32	Diane Whidden	John Amore, Dave Bowers, Esq.,	Sandra Romo	July 30, 2004	Email with attachment	Draft letter by Peter Haller, Esq.
33	Dave Bowers, Esq.	John Amore	Diane Whidden	August 2, 2004	Email	Re: letter to Fishman
34	Dave Bowers, Esq.	John Amore, Diane Whidden	Peter Haller, Esq.	August 4, 2004	Email	Fishman
35	Diane Whidden	Dave Bowers, Esq.	John Amore, Peter Haller, Esq.	August 6, 2004	Email	Fishman
36	Dave Bowers, Esq.	John Amore, Diane Whidden		August 9, 2004	Email	Fishman
37	Dave Bowers, Esq.	John Amore	Diane Whidden	August 12, 2004	Email	Fishman
38	Dave Bowers, Esq.	John Amore		August 16, 2004	Email	Fishman

	Esq.		Monica Maechler, Peter Haller, Esq.			Work Product
42	Diane Whidden	John Amore, Dave Bowers, Esq.		August 25, 2004	Email	Fishman Attorney Client Privilege
43	Dave Bowers, Esq.	Monica Maechler, John Amore, Diane Whidden, Dick Kearns,	Stephen Lindo, Esq., Peter Haller, Esq.	September 2, 2004	Email	Fishman Attorney Client Privilege Work Product
44	Rhiannon Schmieg, Esq.	Axel Lehmann, Diane Whidden, Dave Bowers, Esq.		July 8, 2005	Email with attachment	Administrative Committee Meeting Minutes Attorney Client Privilege Work Product
45	Diane Whidden	Rhiannon Schmieg, Esq.	Axel Lehmann, Dave Bowers, Esq.	July 9, 2005	Email	Administrative Committee Meeting Minutes Attorney Client Privilege Work Product
46	Rhiannon Schmieg, Esq.	Diane Whidden		January 16, 2005	Email with attachment	Draft Administrative Committee response Attorney Client Privilege Work Product
47	Diane Whidden	Axel Lehmann, Dave Bowers, Esq.	Rhiannon Schmieg, Esq.	January 19, 2005	Email	Draft Administrative Committee response Attorney Client Privilege Work Product
48	Dave Bowers, Esq.	John Amore	Diane Whidden	May 15, 2004	Email with attachment	Rob letter Attorney Client Privilege Work Product
49	Diane Whidden	Dave Bowers		May 27, 2004	Email	Draft email Attorney Client Privilege
50	Dave Bowers, Esq.	Karen Hanson	Diane Whidden	August 9, 2004	Email	Certified Letter Attorney Client Privilege Work Product
51	Dave Bowers, Esq.	Diane Whidden		August 11, 2004	Email	SERP letter Attorney Client Privilege Work Product
52	Diane Whidden	Kathy LeBoyer	Dave Bowers, Esq.	August 31, 2004	Email	Fishman SERP payment Attorney Client Privilege
53	Dave Bowers,	John Amore, Dick Kearns,		September 14, 2004	Email	Fishman SERP payment Attorney Client Privilege

Esq.	Diane Whidden					Work Product
Diane Whidden	John Amore	Dave Bowers, Esq.	May 20, 2004	Email with attachment	Benefits estimate letter	Attorney Client Privilege

*SA*, Dated: April 7, 2006

Respectfully submitted,

Defendants Zurich American Insurance Company and  
Zurich North America Supplemental Executive  
Retirement Plan

By:

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One of Their Attorneys

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ROBERT M. FISHMAN, )  
Plaintiff )  
v. )  
ZURICH AMERICAN INSURANCE )  
COMPANY AND ZURICH NORTH )  
AMERICA SUPPLEMENTAL )  
EXECUTIVE RETIREMENT PLAN )  
Defendants. )  
)  
)  
)  
)

Case No. 05 C 5227  
Judge: Shadur

**DEFENDANTS' PRIVILEGE LOG IN CONNECTION WITH ROBERT M. FISHMAN'S  
SECOND REQUEST FOR DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendants  
Zurich American Insurance Company and Zurich North America Supplemental Executive  
Retirement Plan (together, "Zurich") submit the following privilege log in connection with  
Plaintiff's Second Request for Documents:

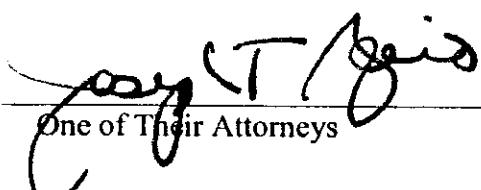
**Withheld Documents**

Author	Recipient(s)	CC:	Date of Document	Type of Document	Re:	Basis of Withholding
55 R. Schmieg	L. Dewald		10/1/02	E-mail	SERP eligibility	Attorney Client Privilege

Dated: May 30, 2006

Respectfully submitted,

Defendants Zurich American Insurance  
Company and Zurich North America  
Supplemental Executive Retirement Plan

By: 

One of Their Attorneys

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ROBERT M. FISHMAN, )  
Plaintiff )  
v. )  
ZURICH AMERICAN INSURANCE )  
COMPANY AND ZURICH NORTH )  
AMERICA SUPPLEMENTAL )  
EXECUTIVE RETIREMENT PLAN )  
Defendants. )  
 )  
 )  
 )  
 )

Case No. 05 C 5227  
Judge: Shadur

**DEFENDANTS' SUPPLEMENTAL PRIVILEGE LOG IN CONNECTION WITH**  
**ROBERT M. FISHMAN'S FIRST AND SECOND REQUESTS FOR DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendants Zurich American Insurance Company and Zurich North America Supplemental Executive Retirement Plan (together, "Zurich") submit the following supplemental privilege log in connection with Plaintiff's First and Second Requests for Documents:

**Withheld Documents**

Author	Recipient(s)	CC:	Date of Document	Type of Document	Re:	Basis of Withholding
Dave Bowers, Esq.	Rhiannon Schmieg, Esq.		January 4, 2005	E-mail with attachment	Memorandum re: R. Fishman SERP matter	Attorney Client Privilege; Work Product

57	Peter Haller, Esq.	Rhiannon Schmieg, Esq.		January 11, 2005	E-mail	Draft re: R. Fishman SERP claim	Attorney Client Privilege, Work Product
58	Vivian Schiebel, Esq.	Rhiannon Schmieg, Esq.	Peter Haller, Esq.	January 12, 2005	E-mail with attachment	Draft re: R. Fishman SERP claim	Attorney Client Privilege, Work Product
59	Vivian Schiebel, Esq.	Vivian Schiebel, Esq.; Rhiannon Schmieg, Esq.	Peter Haller, Esq.	January 12, 2005	E-mail with attachment	Draft re: R. Fishman SERP claim	Attorney Client Privilege, Work Product
60	Vivian Schiebel, Esq.	Rhiannon Schmieg, Esq.	Peter Haller, Esq.; Joseph Baio, Esq.	January 12, 2005	E-mail	Draft re: R. Fishman SERP claim	Attorney Client Privilege, Work Product
61	Vivian Schiebel, Esq.	Rhiannon Schmieg, Esq.	Peter Haller, Esq.	January 12, 2005	E-mail with attachment	Draft re: R. Fishman SERP claim	Attorney Client Privilege, Work Product
62	Dave Bowers, Esq.	Rhiannon Schmieg, Esq.		January 14, 2005	E-mail	Draft re: R. Fishman SERP claim	Attorney Client Privilege, Work Product
63	Rhiannon Schmieg, Esq.	Kathy LeBoyer		May 12, 2005	E-mail	R. Fishman Excess and SERP payment	Attorney Client Privilege, Work Product

64	Rhiannon Schmieg, Esq.	Sarah Staggs		May 12, 2005	E-mail	R. Fishman SERP appeal	Attorney Client Privilege, Work Product
65	Kathy LeBoyer	Rhiannon Schmieg, Esq.		May 12, 2005	E-mail	R. Fishman Excess and SERP payment	Attorney Client Privilege
66	Diane Whidden	Rhiannon Schmieg, Esq.		July 7, 2005	E-mail	R. Fishman SERP claim	Attorney Client Privilege
67	Peter Haller, Esq.	Rhiannon Schmieg, Esq.	Vivian Schiebel, Esq.; Peter Haller, Esq.	July 8, 2005	E-mail	Draft minutes of Committee meeting	Attorney Client Privilege, Work Product
68	Vivian Schiebel, Esq.	Rhiannon Schmieg, Esq.	Joseph Baio, Esq.; Peter Haller, Esq.	July 8, 2005	E-mail with attachment	Draft minutes of Committee meeting	Attorney Client Privilege, Work Product
69	Dave Bowers, Esq.	Rhiannon Schmieg, Esq.	Axel Lehmann, Diane Whidden	July 8, 2005	E-mail with attachment	Draft minutes of Committee meeting	Attorney Client Privilege, Work Product
70	Diane Whidden	Dave Bowers, Esq.; Rhiannon Schmieg, Esq.	Axel Lehmann	July 8, 2005	E-mail with attachment	Draft minutes of Committee meeting	Attorney Client Privilege, Work Product

71	Axel Lehmann	Diane Whidden	Dave Bowers, Esq.; Rhiannon Schmieg, Esq.	July 9, 2005	E-mail with attachment	Draft minutes of Committee meeting	Attorney Client Privilege, Work Product
72	Dave Bowers, Esq.	Diane Whidden	Axel Lehmann; Rhiannon Schmieg, Esq.	July 10, 2005	E-mail with attachment	Draft minutes of Committee meeting	Attorney Client Privilege, Work Product
73	Dave Bowers, Esq.	Rhiannon Schmieg, Esq.	Axel Lehmann; Diane Whidden	July 11, 2005	E-mail with attachment	Draft correspondence to R. Fishman's counsel	Attorney Client Privilege, Work Product
74	Diane Whidden	Dave Bowers, Esq.	Rhiannon Schmieg, Esq.; Axel Lehmann	July 12, 2005	E-mail with attachment	Draft correspondence to R. Fishman's counsel	Attorney Client Privilege, Work Product
75	Dave Bowers, Esq.	Diane Whidden	Rhiannon Schmieg, Esq.	July 12, 2005	E-mail with attachment	Draft correspondence to R. Fishman's counsel	Attorney Client Privilege, Work Product
76	Peter Haller, Esq.	Rhiannon Schmieg, Esq.; Joseph Baio, Esq.	Dave Bowers, Esq.; Peter Haller, Esq.	July 26, 2005	E-mail	Advice as to ERISA	Attorney Client Privilege, Work Product
77	Rhiannon Schmieg, Esq.	Sarah Staggs		July 27, 2005	E-mail	SERP filing	Attorney Client Privilege, Work Product

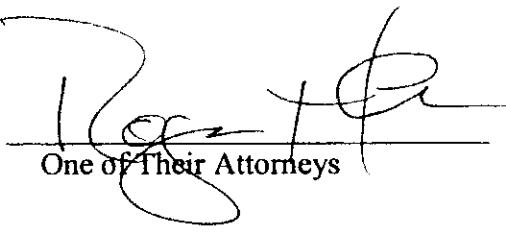
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Sarah Staggs	Rhiannon Schmieg, Esq.	Mark Hall	August 8, 2005	E-mail	SERP filing	Attorney Client Privilege
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Dated: July 20, 2006

Respectfully submitted,

Defendants Zurich American Insurance  
Company and Zurich North America  
Supplemental Executive Retirement Plan

By: 

One of Their Attorneys

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